State Level Expert Review Committees—Are They Protected?

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Synopsis

Recently, the functioning of State-level expert review committees, operating under the auspices of professional medical societies, has become problematic. In particular, an increased number of State maternal mortality review committees have become inactive or disbanded primarily because of concern over liability of committee members and committee proceedings being used in litigation.

A study was conducted of legal protection of the expert review process at the State level. The relevant immunity and privilege statutes of each State and the protection afforded by State law were analyzed.

Findings show that, in all but a few States, the legal risk of participating in expert review is negligible. Most States have statutes that protect information involved in the review process from disclosure or use in subsequent litigation. Laws in most States also protect participants in the review process (both members of committees and providers of information) from civil liability.

FOR YEARS STATE MATERNAL MORTALITY review committees have made an important contribution to maternal health in our nation. More recently, however, many of these committees have become inactive. Representatives of the American College of Obstetricians and Gynecologists, State health departments, and State medical societies attribute the decline in committee activity in large part to legal concerns, such as the liability of committee members and the use of committee proceedings in litigation.

State-level investigation of maternal deaths is the keystone to the national epidemiologic surveillance of maternal mortality conducted by the Centers for Disease Control, Public Health Service. Because State review committees traditionally carry out these investigative functions, the decline in committee activity has proved to be problematic. To better define the problems relating to the decline, we present information regarding legal protection of the expert review process at the State level. The report analyzes the relevant immunity and privilege statutes of each State and assesses the protection afforded by State law to expert review committees.

Although specific concerns regarding maternal mortality review committees prompted this report, the results apply more broadly to other expert committees, such as infant and perinatal mortality review committees, that are established to conduct morbidity and mortality investigations aimed at improving the public's health. The findings presented in this report should help members of State agencies and professional medical organizations to understand the real versus the perceived legal risks associated with their protective statutes and to strengthen that protection when warranted.

Background

The 1990 Health Objectives for the Nation, promulgated by the Public Health Service, emphasized the need to reduce the maternal mortality rate in the United States (*1*). In recent decades, remarkable progress has been made in reducing deaths due to pregnancy and childbearing. However, because the maternal mortality rate has shown little decline in the 1980s (*2*), current projections for 1990 indicate that the intended objective of no more than 5 deaths per 100,000 live births for any county or for any ethnic group will not be met (*3*).

To further reduce maternal mortality, the Federal Government in 1987 initiated National Pregnancy Mortality Surveillance. This ongoing surveillance is conducted by the Division of Reproductive

Health of the Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control (CDC), in collaboration and consultation with organizations representing both the public and private sectors of the health community. The purpose of the surveillance is to identify and describe more completely the number and characteristics of pregnancy-related deaths nationally and to use that information to develop and focus prevention strategies to improve maternal health.

The investigative work done in States by maternal mortality review committees is integral to CDC's National Pregnancy Mortality Surveillance. (*4*). These committees typically operate as a standing committee of the State medical society and are composed of obstetricians, gynecologists, and other health professionals who have a clinical or epidemiologic interest in maternal health.

Historically, maternal mortality review committees began to be established at the local and State level in the 1920s (*5*). In the 1950s, the Committee on Maternal and Child Health Care of the American Medical Association (AMA) developed guidelines for State maternal mortality committees (*6*). Today many State committees operate under a protocol largely based on the AMA model. In general, these committees:

- Obtain cooperation from State medical societies.
- Develop liaison with State health departments.
- Receive notice of maternal deaths from State offices of vital statistics (accompanied by a copy of the decedent's death certificate).
- Collect relevant information pertaining to each maternal death from the physician in charge of patient and from medical records and autopsy reports.
- Remove identifiers from records and assign a case number.
- Distribute information to committee members for analysis.
- Disseminate findings.

A 1976 study showed that between 1968 and 1975, the number of States with active maternal mortality review committees declined from 45 to 38, and for those States that had functioning committees, the authors stated that "medicolegal concerns appear to have impeded case investigation or to have limited dissemination of findings in several States" (*7*). A 1988 study found that the number of States with active maternal mortality review committees had continued to decrease and attributed the decrease to the small number of maternal deaths in the States and to the reluctance of physicians to cooperate because of the current legal climate (*8*).

In conjunction with the new National Pregnancy Mortality Surveillance, CDC established a Maternal Mortality Working Group, composed of representatives of State health departments and medical societies who have broad interest and expertise in maternal health, to provide consultation and guidance. Discussions with working group members revealed both concern and confusion regarding the current status of legal protection for all expert review processes at the State level, including maternal mortality review committees (*9*). The concern and confusion center on the statutory protection for committee members against liability and for committee records and proceedings against disclosure in litigation.

After obtaining advice and approval from the Maternal Mortality Working Group and CDC's Office of Legal Counsel, the Division of Reproductive Health sought legal consultation outside the Federal Government to explore more fully the medical-legal problems that seem to be jeopardizing State maternal mortality investigative activities and National Pregnancy Mortality Surveillance. The research and the analysis for this report were conducted under the direction of the senior author (RFW).

Methods

Collecting information about statutes and court cases involved traditional methods of legal research. The main volumes and annual supplements of statutory codes for each State contained the relevant statutes. Indices to the codes and cross-reference citations after most statutory sections identified those statutes relating to immunity and confidentiality of expert review activities (as opposed to peer review, as defined in the discussion section).

Previously published works confirmed or revealed the existence of several statutes. An American Medical Association compendium (*10*) describes statutes applicable to the peer review process. Several statutes have been amended since that compendium was published, and some statutes cited in it do not apply to the maternal mortality review process at the State level. Articles in legal periodicals also provided partial lists of statutes (*11-13*). In addition, the American College of Obstetricians and Gynecologists and the Vanderbilt

Table 1. Provisions of State statutes related to confidentiality, 1989

State	Covers			Prevents			Protection only for suits re this subject
	Records	Proceedings	Findings	Discovery	Admission as evidence	Forced testimony	
Alabama	X	X	X	X			
Alaska	X	X		X		X	
Arizona	X	X		X		X	
Arkansas	X	X	X	X	X	X	X
California	X	X		X		X	
Colorado	X			X			X
Connecticut		X		X	X	X	X
Delaware	X	X		X		X	
District of Columbia		X	X	[1]X	[1]X		
Florida	X	X	X	X	X	X	X
Georgia	X	X	X	X	X	X	X
Hawaii	X	X		X		X	
Idaho	X	X	X	X	X	X	
Illinois	X			X	X		
Indiana			X	X			
Iowa	X	X	X		X		
Kansas	X	X	X	X	X	X	
Kentucky	X	X	X	X	X	X	
Louisiana	X	X		X			
Maine	X	X		X			
Maryland	X	X		X	X		X
Massachusetts	X	X	X	X	X	X	
Michigan	X	X	X	X	X		
Minnesota	X	X		X	X	X	X
Mississippi	X	X	X	X	X	X	X
Missouri		X	X	X	X	X	
Montana	X	X		X	X	X	
Nebraska	X		X		X		
Nevada	X	X		X		X	
New Hampshire	X	X	X	X	X		
New Jersey	X			X	X		
New Mexico	X	X		[1]X	[1]X	[1]X	
New York	X	X		X		X	
North Carolina	X	X		X	X	X	X
North Dakota	X	X		X	X		
Ohio	X	X	X	X	X	X	X
Oklahoma	X		X		X		
Oregon	X	X	X		X	X	
Pennsylvania	X	X	X	X	X	X	X
Rhode Island	X	X	X	X	X	X	
South Carolina	X	X		X	X	X	
South Dakota	X	X	X	X	X	X	
Tennessee	X	X	X	X			
Texas	X	X	X	X	X		
Utah	X		X		X		
Vermont	X	X	X	X	X	X	X
Virginia	X	X	X	[1]X			
Washington	X	X	X	X			
West Virginia	X	X	X	X	X	X	X
Wisconsin		X	X	X	X	X	
Wyoming	X	X	X	X	X	X	
All	46	44	31	46	36	31	13

[1]Qualified protection.

Institute for Public Policy Studies provided copies of their unpublished compilations of statutes.

Relevant judicial decisions appear in official and commercial reporters. The annotations appearing in some statutory compilations, articles in the legal literature, Shepard's Citation Service, and computerized research on the LEXIS and WESTLAW database services all helped to identify the relevant cases.

To supplement the information about statutes and court cases, we spoke to legal, medical, and public health staff associated with medical societies

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and health departments in several States. Our discussions focused on the current status of the maternal mortality review processes and on local perceptions of the adequacy of legal protections. Staff were consulted for these States: Colorado, Florida, Indiana, Massachusetts, Minnesota, New Jersey, New York, North Carolina, South Carolina, Texas, Washington, and Wisconsin.

In addition to the findings that they present in this paper, Wright and Smith have prepared an appendix which annotates each State's legal protection. This appendix is available from the Government Relations Department, American College of Obstetricians and Gynecologists, 409 12th St. SW, Washington, DC 20024-2188.

Findings

In the overwhelming majority of States, the legal risk of participating in expert review is negligible. The protections of State law are divided into two categories: confidentiality and immunity. Confidentiality laws protect from disclosure information gathered and created during the review process; some prevent the use of such information in a subsequent lawsuit. Immunity laws insulate participants from personal liability based on actions taken during the review process.

Most States have confidentiality statutes protecting information involved in the review process from disclosure or use in subsequent litigation. Most statutes prevent disclosure of information in "discovery" proceedings; that is, the portion of a lawsuit in which parties may collect information pertinent to their claims or defenses. The most expansive protection not only prevents discovery of relevant documents but also makes such evidence inadmissible at trial. This broader protection would become helpful if a party to a lawsuit obtained a document through inadvertence or some other method outside the discovery process. In such a case, the document would have little value to a litigant because it would not become evidence in a trial.

Table 1 summarizes the features of confidentiality statutes in the laws of each State.

Most States also have statutes immunizing participants in the expert review process from civil liability. The most effective statutes protect both the members of the committee and any witness, provider of information, consultant, or employee of the committee. Most statutes will immunize conduct only if that conduct is "without malice," or in other words, only when a person acts on the basis of a reasonable belief that it is the proper thing to do.

Immunity protections are less important than confidentiality for maternal mortality review committees. Because no adverse action, such as restriction of staff privileges or loss of license, is normally taken against a physician as a result of a typical maternal mortality review committee finding, physicians have little risk of being sued personally because they served on such a committee. Nevertheless, immunity protections may be valuable as a guard against lawsuits in the unlikely event that one arises from some other source.

Table 2 summarizes the features of immunity statutes in the laws of each State. Table 3 describes the structure of review committees as envisioned in each statute and the purpose of the protected committees. The box on page 20 lists citations to the relevant statutes. Finally, a map of the United States places States into three categories. The first is States with "below average applicability;" their peer review statutes probably would not apply to expert review committees. The second category, States with "below average confidentiality," have statutes that provide less protection than most because litigants can bypass the statutes in special cases. The third category consists of States with no significant problems with protection.

Discussion

The legal protection provided by State law to maternal mortality review committees depends on the extent to which State law recognizes the difference between maternal mortality review and peer review. Peer review normally takes place at the

Table 2. Provisions of State statutes related to immunity, 1989

State	Covers		Malice exception	Association also immune
	Members	Consultants or witnesses		
Alabama	X	X	X	X
Alaska	X	X	X	
Arizona	X	X	X	X
Arkansas	X		X	
California	X	X	X	X
Colorado	X	X	X	
Connecticut	X		X	
Delaware	X	X	X	X
District of Columbia	X	X	X	
Florida	X	X	X	
Georgia	X	X	X	
Hawaii	X		X	
Idaho		X		
Illinois	X	X	X	
Indiana		X		
Iowa	X	X		
Kansas		X		
Kentucky	X	X	X	
Louisiana	X	X	X	
Maine	X			
Maryland	X	X	X	
Massachusetts	X		X	
Michigan	X	X	X	
Minnesota	X	X	X	X
Mississippi	X	X	X	
Missouri	X	X	X	
Montana	X		X	
Nebraska	X	X	X	
Nevada				
New Hampshire	X		X	
New Jersey	X		X	
New Mexico	X	X	X	
New York	X		X	
North Carolina	X		X	
North Dakota				
Ohio	X	X		
Oklahoma		X		
Oregon	X	X	X	
Pennsylvania	X	X	X	
Rhode Island	X	X	X	X
South Carolina	X		X	
South Dakota	X		X	
Tennessee	X	X	X	
Texas	X	X	X	
Utah	X	X		
Vermont	X		X	
Virginia	X	X	X	
Washington	X	X	X	
West Virginia	X	X	X	X
Wisconsin	X		X	
Wyoming	X	X	X	X
All	45	35	41	8

local level or within an institution such as a hospital. It evaluates medical treatment to assure the quality of the care given. Such an evaluation could be designed to enforce or improve the practices expected of persons with staff privileges to control the costs of medical care. Even when a State medical society or some entity of State government conducts peer review, the purpose of the review focuses on the qualifications of health care providers.

Maternal mortality review, on the other hand, does not consider the qualifications of any physician or the cost-effectiveness of a particular course of treatment. The committee need not (and often

Table 3. Structure and purpose of review committees as envisioned in State statutes, 1989

State	Structure		Purpose			
	State medical society may appoint	Authorization of health department required	Research	Improving health care	Maintaining professional standards	Professional discipline
Alabama	X	X			X	
Alaska	X	X	X	X	X	
Arizona	X			X		X
Arkansas	X			X		
California	X				X	
Colorado	X					X
Connecticut	X			X		X
Delaware	X			X		
District of Columbia	X					X
Florida	X			X		X
Georgia	X			X		
Hawaii	X				X	
Idaho	X	X	X	X	X	X
Illinois	X		X	X		X
Indiana	X	X	X			
Iowa	X		X			
Kansas	X	X	X	X		X
Kentucky	X					X
Louisiana	X				X	
Maine	X					
Maryland	X			X		X
Massachusetts	X			X	X	X
Michigan	X		X		X	X
Minnesota	X		X	X	X	X
Mississippi	X			X		
Missouri	X			X		
Montana	X				X	
Nebraska	X		X			
Nevada	X			X		
New Hampshire	X			X		
New Jersey	X	X	X	X	X	X
New Mexico	X		X	X	X	X
New York	X			X		
North Carolina	X			X		
North Dakota	X					
Ohio	X				X	
Oklahoma	X		X			
Oregon	X				X	X
Pennsylvania	X			X		
Rhode Island	X			X	X	
South Carolina	X				X	
South Dakota	X				X	
Tennessee	X			X		
Texas	X		X			
Utah	X		X	X		X
Vermont	X			X	X	
Virginia		X			X	
Washington	X					X
West Virginia	X			X		
Wisconsin	X			X		
Wyoming	X				X	
All	50	7	14	28	20	18

does not) know the name of the physician or the patient in the case. The findings of the committee do not result in loss of staff privileges or license or in any other form of discipline. Maternal mortality review takes place at a State level; its only aim is research to identify the most effective forms of treatment or prevention. To distinguish maternal mortality review and other forms of State-level, research-oriented review from peer review, in this report we use the terms "expert review" and "peer review."

Perhaps the greatest legal risk for expert review exists in States that have immunity and confidentiality statutes that are applicable only to peer

review. (No State has a statute that specifically names the maternal mortality review committee as a protected body.) Expert review committees often find protection under the same statute that applies to peer review. If "peer review" is defined broadly by a statute to include reviews for "improving the quality of health care" or "reducing mortality and morbidity," expert review is probably also protected. On the other hand, if a statute protects peer review only for purposes of assuring the quality of professional credentials or some other disciplinary purpose, expert review such as a maternal mortality review committee might be left with no special statutory protection. Those States with the lowest risk on this score appear in table 3 under the heading "Research purpose." In those States, the statute explicitly extends to reviews aimed at furthering health care research. States with the greatest risk appear on the map in the category, "below average applicability."

Legal structure of the committee. Expert review typically involves some cooperation between the State health department and the State medical society. The health department arranges for a committee of the medical society (or its designated representative) to receive records, such as death certificates and autopsy reports, relating to maternal deaths. Sometimes the medical society acts without any formal or informal authorization from the health department. A few State statutes (as in California and Hawaii) provide some protection to committees of local medical societies that is not available to committees of State medical societies. In those States, an affiliation with the local society would provide the most protection.

Some statutes require that the committee be authorized by the health department before immunity and confidentiality will apply to the committee's work. It is important to confirm with legal counsel that the group carrying out expert review has obtained the authorization required by law. Similarly, if the statute requires a particular type of proceeding, such as an actual meeting of the committee rather than a telephone conversation or correspondence, the statutory requirements should be followed to ensure that the committee does not lose its legal protection.

Summary of confidentiality statutes. The typical confidentiality statute protects certain committee information from discovery in a civil suit. When parties to a lawsuit make a request during discovery for the committee to turn over protected information, the committee may refuse to do so. A smaller number of statutes protect committee information from subpoena, which is an order to appear at a legal proceeding. This protection prevents a party to a lawsuit from forcing another party to bring a document to trial, but it does not prevent the first party from using whatever documents or testimony he or she already possesses.

The strongest statutes go beyond the exemption from discovery or subpoena and provide that committee information is inadmissible as evidence. Thus, if some committee information inadvertently leaks out, it still may not be used as evidence at trial. A few statutes provide simply that committee information is "privileged," which implies an exemption both from discovery and from use as evidence. Three entities (Virginia, New Mexico, and the District of Columbia) do not protect committee information from discovery at all if a litigant can convince a judge that there is "good cause" for them to obtain the information. They provide only "qualified" protection.

Confidentiality normally applies to all civil proceedings, but in a minority of States the protections apply to some types of lawsuits and not to others. For instance, in some States confidentiality only applies in lawsuits involving the same "subject matter" that was considered by the committee. In other words, if representatives of the patient whose case was being reviewed tried to discover committee documents, they would fail; however, if representatives of some other patient with a similar problem tried to obtain the same documents, they might succeed. Although this provision could limit significantly the protection offered, it will become relevant only in situations where committees hear two cases with enough similarity for the committee's findings in one case to become useful in a lawsuit relating to the second case. Given the small number of cases reviewed by the typical maternal mortality review committee, such similar cases would be unlikely to occur.

Many confidentiality statutes create an exception for information sought by a physician in a lawsuit challenging his or her loss of license or staff privileges. Under these statutes, the physician may obtain committee information through discovery. However, since physician discipline normally does not result from maternal mortality review, this sort of lawsuit (and possible disclosure) is unlikely to happen.

The committee information protected from discovery or admission as evidence includes both documents and testimony. The documents covered

Citations of State Statutes Relevant to Expert Review Committees

State	Citation	State	Citation
Alabama:	Ala. Code §§ 6-5-333, 34-24-58	Missouri:	Mo. Rev. Stat. § 537.035
Alaska:	Alaska Stat. § 18.23	Montana:	Mont. Code Ann. § 37-2-201
Arizona:	Ariz. Rev. Stat. Ann. §§ 36-2401 to 2403	Nebraska:	Neb. Rev. Stat. § 71-3401, 3402, 3403, 147.01
Arkansas:	Ark. Stat. Ann. §§ 20-9-501 to 503	Nevada:	Nev. Rev. Stat. § 49.265
California:	Cal. Civil Code § 43.7, Cal. Evidence Code § 1157	New Hampshire:	N.H. Rev. Stat. Ann. §§ 329:29, 507:8-C
Colorado:	Colo. Rev. Stat. §§ 12-43.5-101 to 103	New Jersey:	N.J. Rev. Stat. §§ 26:1A-37.2, 2A:84A-22.10
Connecticut:	Conn. Gen. Stat. §§ 38-19a to f	New Mexico:	N.M. Stat. Ann. §§ 41-9-2 to 6
Delaware:	Del. Code Ann. tit. 24, § 1768	New York:	N.Y. Educ. Law § 6527
District of Columbia:	D.C. Code Ann. §§ 32-501 to 505	North Carolina:	N.C. Gen. Stat. § 131E-95
Florida:	Fla. Stat. § 768.40	North Dakota:	N.D. Cent. Code § 31-08-01
Georgia:	Ga. Code Ann. §§ 31-7-15, 131 to 133, 140	Ohio:	Ohio Rev. Code Ann. § 2305.25, 2305.25.1
Hawaii:	Haw. Rev. Stat. § 663-1.7	Oklahoma:	Okla. Stat. tit. 63, § 1-1709
Idaho:	Idaho Code § 39-1392	Oregon:	Or. Rev. Stat. § 41.675
Illinois:	Ill. Rev. Stat. ch. 110, para. 8-2101 to 2103; ch. 111, para. 4400-5	Pennsylvania:	63 Pa. Cons. Stat. §§ 425.2 to .4
Indiana:	Ind. Code § 16-4-2-1 to 4	Rhode Island:	R.I. Gen. Laws § 5-37.3-4 to 5-37.3-7
Iowa:	Iowa Code §§ 135.40 to .42	South Carolina:	S.C. Code Ann. §§ 40-71-10, 20
Kansas:	Kan. Stat. Ann. 65-177, 178, 4914, 4915	South Dakotá:	S.D. Codified Laws Ann. §§ 36-4-25, 26, 26.1
Kentucky:	Ky. Rev. Stat. Ann. § 311.377 (Baldwin)	Tennessee:	Tenn. Code Ann. § 63-6-219
Louisiana:	La. Rev. Stat. Ann. § 13:3715.3	Texas:	Tex. Health & Safety Code Ann. § 4447D
Maine:	Me. Rev. Stat. Ann, tit. 32, §§ 3293, 3296	Utah:	Utah Code Ann. §§ 26-25-1 to 4
Maryland:	Md. Health Occ. Code § 14-601	Vermont:	Vt. Stat. Ann. tit. 26, §§ 1441-43
Massachusetts:	Mass. Gen. L. ch. 111, §§ 1, 204; ch. 231, § 85N	Virginia:	Va. Code Ann. § 8.01-581.16, .17
Michigan:	Mich. Comp. Laws §§ 14.57(21)-(23)	Washington:	Wash. Rev. Code §§ 4-24-240, 250
Minnesota:	Minn. Stat. §§ 145.61-.65	West Virginia:	W.Va. Code §§ 30-3C-1 to 3; 30-1-16
Mississippi:	Miss. Code Ann. §§ 41-63-1 to 9	Wisconsin:	Wis. Stat. §§ 146.37, 146.38
		Wyoming:	Wyo. Stat. § 35-17-101 to 106

by statute are often described as "records" and "proceedings," which include most of the documents normally involved in maternal mortality review, such as questionnaires filled out by physicians, notes regarding interviews, and memoranda analyzing the information gathered.

Many statutes say that preexisting documents available from independent sources are discoverable even though such documents are presented to the review committee. This stipulation should pose no problem to review committees because the documents involved would be discoverable whether or not the committee used them.

Testimony is also sheltered: parties may refuse to testify about what took place during committee proceedings. Under some statutes, witnesses are forbidden to testify about committee business even if they choose to do so. Some statutes allow testimony relating to matters discussed before the committee if the witness has some "independent" knowledge of those matters. For example, a witness present during treatment may describe to the com-

mittee what was seen and could also testify about the same matter in litigation. However, these same statutes always confirm that the witness may not testify about what actually transpired at a committee meeting or about an opinion formed as a result of the committee proceedings.

Even when a statute is silent regarding testimony, such protection might be implied by other language in the law. When a statute protects "proceedings" of the committee from admission into evidence, presumably both documents and testimony revealing what happened in a committee meeting would be excluded from evidence.

The final recommendations or findings of the committee are not always given the same protection as that given the records and proceedings of the committee. However, most States explicitly protect committee findings. Many committees will choose to publish their findings and will therefore be more concerned with admissibility than discovery. A few statutes require that all patient identifiers be removed from the final report. Even when not required by law, removal of names would be a prudent practice.

Summary of immunity statutes. Immunity always extends to members of the review committee, and it often extends to witnesses and others who provide information. Virtually every statute limits immunity to those cases in which the physician acts "without malice." A person acts without malice under the following circumstances: (*a*) he or she makes a reasonable effort to determine the true facts and (*b*) he or she reasonably believes that the action taken is appropriate.

Personal lawsuits against committee participants normally are brought by physicians who are adversely affected by a peer review decision. Once again, because adverse effects to the physician who handled the case do not normally occur as a consequence of the review by the maternal mortality review committee, the risk of a committee participant being sued personally is low.

Judicial interpretations of statutes. Whenever statutory language is unclear, the courts must interpret the meaning of the statute by trying to determine the intent of the legislature at the time it passed the bill. Therefore, maternal mortality review committees should remain informed about all court decisions in their State that interpret the relevant statute. A regular (perhaps an annual) consultation with legal counsel would offer the best information about such decisions.

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For many statutes, no judicial interpretations have appeared yet. Courts that have been asked to interpret statutes have tended not to read the statutes in an unexpected way.

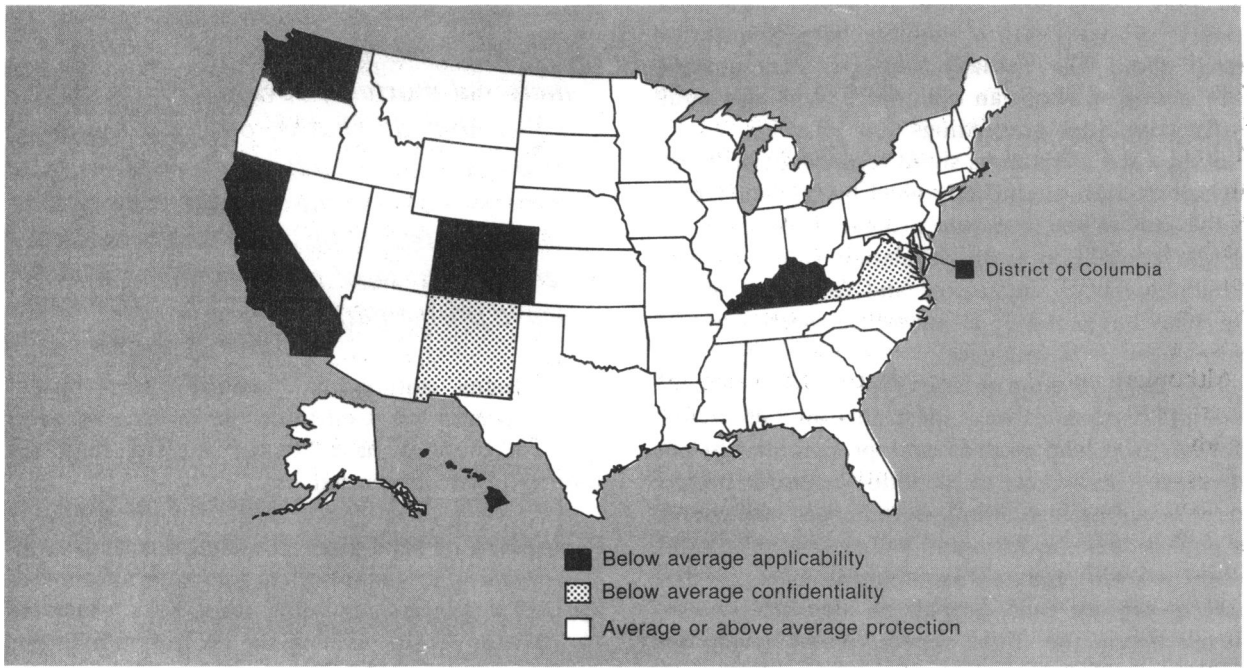
Perceptions of legal risk. The concerns of persons and organizations involved in the maternal mortality review process regarding legal risks generated the impetus for researching the protection afforded by State statutes. In some instances the perceptions of legal risks are accurate. For example, one may correctly perceive low legal risks when in fact there are low risks because statutory protection is strong, or one may correctly perceive higher legal risks when in fact there are higher risks because statutory protection is weaker.

On the other hand, not all of the perceptions of legal risk expressed by those involved in the maternal mortality review process are well-founded. That is, on examination of protective statutes, concerns of some persons about lawsuits may not be warranted. Conversely, complacency about legal risks by others may prove problematic. In any case, a clear understanding of State statutes and discussions with informed legal counsel must be part of an accurate assessment of legal risks.

A survey of legal counsel associated with medical societies and health departments in several States revealed a relatively low level of concern in the legal community about legal risks. Although some were unfamiliar with the maternal mortality review process, legal counsel familiar with both the statutory protections and the review process reported no significant legal difficulties in the past and expressed little or no concern about the adequacy of coverage for future activities of the review committees.

Impact of Federal law. The legal protection for expert review currently derives from State rather than Federal law. Two sources of Federal law—the anti-

Level of protection provided expert review committees by State statutes, 1989



trust laws and the Health Care Quality Improvement Act (HCQIA) of 1986—have a bearing on peer review but not on expert review.

The antitrust laws prohibit conspiracies among competitors to reduce competition. A group of physicians using peer review in bad faith as a way to eliminate competitors (by stripping them of staff privileges or licenses) might be liable under the antitrust laws (*14*). Antitrust suits are normally filed by a physician whose staff privileges or license is adversely affected by a peer review decision. Because expert review typically does not involve any decision relating to a physician's privileges or license, the antitrust laws do not pose a significant legal threat to the expert review activities covered by this report.

The HCQIA (*15*) protects all participants in certain peer review activities from any civil damage action, provided they make a reasonable effort to obtain acurate facts and reasonably believe their action will further quality health care. This strong immunity statute will provide uniform legal protection for all States that do not "opt out" of its provisions. However, the HCQIA applies only to peer review activities with the purpose of physician discipline. Because the expert review activities covered by this report (including maternal mortality review) do not involve physician discipline, the HCQIA will not apply. Conversations with the persons in the Department of Health and Human Services responsible for drafting regulations under this statute confirm this interpretation of the statute.

Implications for other forms of expert review. This review of State statutes has direct relevance to public health policy. Recently, the National Academy of Sciences' Institute of Medicine released a report addressing the future of public health in the United States and delineating Federal and State government responsibilities for public health. The report concludes that "states are and must be the central force in public health" and recommends that "states review their public health statutes and make revision as necessary" to ensure an adequate statutory base for health activities (*16*). Our project has in large measure accomplished the review of laws that govern health-related expert review committees operating at the State level.

The concept of expert review committees comprised of practicing clinicians, public health officials, medical school faculty, and other health professionals collectively focusing their expertise on a specific health problem is common to almost all States. Maternal mortality review committees are the premier example of such expert review committees. Yet the establishment of expert review committees is not limited to committees to investigate

maternal deaths. For years it has been suggested that maternal mortality review committees should extend their activities to include maternal morbidity and perinatal mortality (*5*). In fact, "A Guide for Maternal Death Studies" (*17*), promulgated more than two decades ago by the AMA Committee on Maternal and Child Care, suggested that a similar guide be developed for organizing and operating an expert review committee to investigate perinatal deaths (*6*). Recently, the 1988 report of the National Commission to Prevent Infant Mortality recommended that States "establish expert review panels to investigate each infant death" (*18*).

Although they have recognized the value of expert review committees, the medical and public health communities are aware that legal safeguards are necessary to protect committee members and the committee proceedings. More than 30 years ago, the AMA "A Guide for Maternal Death Studies" pointed out that laws protecting expert review committees vary from State to State and encouraged committees to seek advice from legal counsel whenever questions and concerns arose (*6*). In a recent article stressing the importance of having a review committee investigate maternal deaths, Sachs and coworkers pointed out that cooperation from clinicians and institutions requires legislation to protect the committee's work from being misused in litigation (*19*). Similarly, the Department of Health and Human Services' "Infant Mortality Review Manual," which is a guide for investigating infant deaths, suggests that State statutes be examined to see if they adequately protect the data and opinions of the infant mortality review committee from admission as evidence in court (*20*).

The survey that we conducted suggests that legal protection for expert review is currently adequate in all but a few States. Nonetheless, the conclusions that we reached should supplement rather than replace the advice of counsel regarding protection for expert review that is afforded by State laws.

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